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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1935.

Nos. 195, 196 and 197.

UNITED STATES OF AMERICA,
Petitioner,

v.

BANK OF NEW YORK AND TRUST COMPANY.

UNITED STATES OF AMERICA,
Petitioner,

v.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY.

UNITED STATES OF AMERICA,
Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York.

BRIEF OF GUARANTY TRUST COMPANY OF NEW YORK AS *AMICUS CURIAE.*

JOHN W. DAVIS,
Attorney for Guaranty Trust Company of New York as *Amicus Curiae.*

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BRIEF OF GUARANTY TRUST COMPANY OF NEW YORK AS *AMICUS CURIAE*.

Consent of the Parties.

This brief is submitted upon the written consent of the parties to these appeals, filed with the clerk of this Court. Guaranty Trust Company of New York is a defendant in an action brought by the United States involving the question here discussed.

The Question Presented.

This brief is confined to the question raised on the present appeals of the effect to be given within the United States to confiscatory decrees of the Soviet Government. From that Government, at the moment that it became in contemplation of our law an international person by the act of the Executive in according recognition to it in the ordinary conduct of foreign relations, the United States took an assignment of "the amounts admitted to be due or that may be found to be due it [the Soviet Government], as the successor of prior governments of Russia, or otherwise, from American nationals."

The United States is now asserting through the courts, in the present and in other actions, title by virtue of this assignment to debts and evidences of debt held within the territory of the United States by American nationals for Russian nationals, prior to November 7, 1917. Such assertion of title rests essentially upon the contention that Soviet law transferring the ownership and right of possession of the property of Russian corporations from them to the Soviet Government, is effective as to these debts and evidences of debt owed and held by American nationals within the United States, to the same degree as if they were tangible property situated within Russia. The record fairly exhibits the exact quality of the Soviet law so invoked, in its operation within Russia, as representing the extreme application of power available to a territorial sovereign. The property of the former owners was "confiscated and appropriated" (R. 3), i. e., attempted to be transferred to the State by force and without recompense.

The contention of the United States in this regard is so novel, and the decision of this Court thereon is so important, not only in this and other cases involving substantial sums but in the foreign relations of this country, that we trust this Court will deal with it explicitly.

1. The Application of Foreign Law Herein Sought Is Truly Extra-Territorial.

The United States' claim of title upon the basis of Soviet law governing Russian nationals and their property, to debts and evidences of debt owed and held by American nationals within the United States, rests finally upon the thesis that Soviet law operates upon property situated outside its proper area of power.

This is not conceded to be so by the United States, which in its brief asserts that the property here in question must be deemed situated in Russia (pp. 42-4). But the cases cited in support of this assertion do not support it, for the reason, pointed out by the respondents (e. g., brief of Bank of New York & Trust Co., pp. 11-12), that the fiction *mobilia personam sequuntur* as applied by this Court in those cases to the question of jurisdiction to tax intangibles turn precisely upon the point that the tax is upon the privilege of succession, not upon the property itself. *Blodgett* v. *Silberman,* 277 U. S. 1 at 8; *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204 at 214. Thus the operation of the maxim *mobilia personam sequuntur* to sustain the tax in those cases is in reality permissive as to the owner of the property, not *in invitum.* Moreover, its fictional basis is well recognized in this Court, which employs it in accordance with "the demands of convenience and justice" (*Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 92) and will, when the demands of convenience and justice point elsewhere, refuse to follow the maxim to a conclusion otherwise logical. *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 93.

The fact, therefore, that debts and evidences of debt owed or held by American nationals in the United States might properly be taxed upon succession at death at the domicile of the creditor or owner, and would for such purpose be treated as "localized at the creditor's domicile" (*Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. at 211), cannot abstract them from the necessary operation of the territorial

law of the place where they are payable or deliverable. It cannot obscure the fact that for the application of the Soviet law thereto, in connection with the establishment of the title claimed by the United States, *the aid of the local courts must be invoked.*

So this Court determined in *Baker* v. *Baker Eccles & Co.*, 242 U. S. 394, that the claim of a Tennessee decedent against a Kentucky corporation for surplus profits was localized in Kentucky in such sense that the state of domicile could not by *in rem* proceedings determine the course of its devolution as personal property. Compare *De Ganay* v. *Lederer*, 250 U. S. 376, 382 (taxable situs). Under the law of New York, where the property here in question is deposited, the localization of a bank account at the point of deposit is so clearly recognized that an attachment levied upon the head office of a bank is held not to reach an indebtedness owed by the bank to the attachment debtor in the form of a deposit established with and repayable at a branch outside New York. *Bluebird Undergarment Co.* v. *Gomez*, 139 Misc. 742, following *Richardson* v. *National Bank of India*, 43 T. L. R. 631.

It may be added that such title as the Soviet Government acquired in Russia to the property there of the former Russian corporations entitled to the property here in question, does not upon this record bear any aspect of a universal succession. The Soviet Government succeeded to no *universitas juris*. Rather it shattered the *universitas juris* in each case. There is no question here of the effectiveness of Soviet law in terminating the existence of the Russian corporations which were subject to its power and existed only by franchises from its predecessor government. The fact of termination under the applicable foreign law has been recognized by the House of Lords in *Lazard Brothers & Co.* v. *Midland Bank*, [1933] A. C. 289, upon principles implicit in the law of this Court ever since *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588, and should, we believe, be recognized and given effect here. But the non-existence of the former corporate owners does not permit the conclusion, without some

further course of reasoning, that their property localized in the United States has been aliened by the same manifestation of power.*

2. The Confiscatory Decrees Underlying the United States' Assertion of Title Do Not Apply *Ex Proprio Vigore* and Should Not Be Extended by This Court.

It is a remarkable fact that the courts generally have recognized and given effect to transfers of title by confiscation with respect to property, tangible or intangible, within the territorial jurisdiction of the foreign confiscatory law—

Oetjen v. *Central Leather Co.*, 246 U. S. 297 (hides in Mexico);

Ricaud v. *American Metal Co.*, 246 U. S. 304 (bullion in Mexico);

Salimoff & Co. v. *Standard Oil Co.*, 262 N. Y. 330 (oil lands and oil in Russia);

Dougherty v. *Equitable Life Assurance Society*, 266 N. Y. 71, 87, 103 (life insurance contract governed by Russian law);

Princess Paley v. *Weisz*, [1929] 1 K. B. 718 (furniture and works of art in Russia);

Luther v. *Sagor & Co.*, [1921] 3 K. B. 532 (mill and lumber in Russia)—

while at the same time denying effect to attempted transfers by confiscatory foreign law with respect to property situated outside the territorial jurisdiction of the law:

The Jupiter, [1927] P. 122, 250 (ship at Odessa during French occupation);

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* The New York Court of Appeals did treat the two questions together and in the same way where they were presented in the same allegation of a pleading. *Vladikavkazsky Railway Co.* v. *New York Trust Co.*, 263 N. Y. 369. But the same Court has more recently intimated that, when the question of the continued existence of the Russian corporate owner is properly presented, it will decide it in the negative. *Israia* v. *Russo-Asiatic Bank*, 266 N. Y. 37, 43.

Etat Russe v. *Ropit,* 52 Clunet 391, 53 Clunet 667, 55 Clunet 674 (ships at Marseilles);
Vladikavkazsky Railway Co. v. *New York Trust Co.,* 263 N. Y. 369 (bank deposit in New York);
In Re Russian Bank for Foreign Trade, [1933] 1 Ch. 745, 767 (debt recoverable in London);
Sedgwick Collins & Co. v. *Rossia Insurance Co.* [1926] 1. K. B. 1, 15, affirmed [1927] A. C. 95 (debts payable in England);
Lecouturier v. *Rey,* [1910] A. C. 262 (trade marks registered in England).

Thus, having regard to the authority accumulated upon the subject, this Court might conclude that Soviet law is ineffective as to the debts and evidences of debt here involved simply because it can have no real or physical operation thereon. In two decisions this Court has adumbrated such a conclusion. *Baglin* v. *Cusenier Co.,* 221 U. S. 580, held that French law dissolving the congregation of the Chartreux and taking possession of the properties of the order in France, where the Chartreuse liqueur had been manufactured for hundreds of years, did not divest the title of the order to a trademark for the product registered in the United States. The Court found that the French law (p. 596)

> "cannot be conceived to have any extra-territorial effect to detach the trademarks in this country from the product of the Monks, which they are still manufacturing."

Mr. Justice Hughes then quoted with approval the language of Lord MacNaghten in *Lecouturier* v. *Rey,* [1910] A. C. 262, 265:

> "To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market."

Again in *Second Russian Insurance Co.* v. *Miller,* 268 U. S. 552, 560, this Court held that a Russian ukase forbidding commercial relationships between Russian subjects and German subjects had no effect upon a contract between a Russian insurance company and its New York agent whereby certain reinsurance commissions were segregated for the benefit of German agents.

In both these cases this Court seems to have delimited the application of foreign law along the lines of territorial jurisdiction as the measure of the potential application of force. The distinction is to be noted between these cases and *Canada Southern Railway Co.* v. *Gebhardt,* 109 U. S. 527 (operation of law of the corporate domicile upon internal relations of the corporation), and *Direction der Disconto-Gesellschaft* v. *U. S. Steel Corporation,* 267 U. S. 22, 28 (operation of foreign law upon a stock certificate situated within the jurisdiction).

But a further and positive reason exists against the extension of Soviet law to affect the title to the property here involved, through the instrumentality of our courts applying conflict-of-laws principles. That is the public policy of the forum, which, wherever truly extra-territorial effect has been sought to be given to Soviet law, has been found to be decisive against it. Public policy is a doctrine for the protection of the state interest. 1 Beale on the Conflict of Laws (1935) p. 59.

One of the highest state interests of this country is the principle, embedded in the Fifth and Fourteenth Amendments, that private property shall not be taken for public use without compensation. The United States has sought not only to apply this principle internally but to incorporate it into the body of international law.

United States v. *Percheman,* 7 Pet. 51, 86-7 (1833);
Hyde, International Law, § 622;
Delagoa Bay Railway case, 2 Moore International Arbitrations 1865, 1869.

In the recent controversy on the Mexican land laws, the Secretary of State in his note to Mexico dated July 31, 1926, laid down the following bases for the American case (21 American Journal of International Law 294-5):

> "First. Lawfully vested rights of property of every description are to be respected and preserved in conformity with the recognized principles of international law and equity.
>
> * * * * * * *
>
> Third. The principle of international law that it is both the right and the duty of a government to protect its citizens against any invasion of their rights of person or property by a foreign government, and that this right may not be contracted away by the individual is conceded.
>
> Fourth. The principle that vested rights may not be impaired by legislation retroactive in character or confiscatory in effect is not disputed."

This long-settled and paramount policy of the United States in foreign relations could not but be greatly shaken and impaired by a decision of this Court that the devolution of title to the United States upon a basis of sheer confiscation is in accord with the public policy of the forum. By such a finding the very claims whose settlement is contemplated in the exchange of notes between the President and the Soviet Commissar for Foreign Affairs dated November 16, 1933, might be destroyed internationally. For after the rendition of such a judgment at its own solicitation by the highest court of the Union the United States could not reasonably assert that Soviet public policy as represented by the confiscatory decrees diverged from its own policy. After benefiting as an assignee from the fruits of Soviet confiscation, the United States could not well maintain upon the international plane a claim for the property of its nationals taken in Russia by the same decrees.

These considerations conclusively indicate, to our mind, that the public policy of the forum would as a matter of

state interest require this Court to deny effect to Soviet law with respect to the property here involved even if such law could (as it has been shown it could not) take effect *ex proprio vigore*. The ingenious suggestion is made in the brief of the United States (pp. 40, 48) that the public policy determinative of these appeals is fixed by the action of the Executive for this single instance. Such surely can not be the case. Public policy for the purposes of the conflict of laws is settled by the Constitution, the statutes of Congress pursuant thereto, and the course of administration and decision. *St. Louis Mining Co.* v. *Montana Mining Co.*, 171 U. S. 650, 655. It would be strange indeed if a confiscatory practice denied to our Government by the Constitution in a fashion absolute, not relative (*Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 492), could be made to accord with the public policy of this country, even transiently as an aid in the extension to this jurisdiction of relevant foreign law, by the isolated act of the Executive in the conduct of foreign relations. The constitutional exercise of the executive power to that end can be implemented within this country by the application of foreign law here under our conflict-of-laws rules, *only* in the manner and to the extent permitted by the Fifth Amendment.

The suggestion of the United States as to the determination of public policy for these appeals, therefore, amounts to saying that the United States should have the property in dispute because it wants it, and involves the negation of legal reasoning. In the hands of this Court it must lie to determine what is the real public policy of the country with respect to property rights and whether that policy permits the extra-territorial application of Soviet law to debts and evidences of debt payable or deliverable in the United States.

Respectfully submitted,

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